

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ZURICH AMERICAN INSURANCE )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MICROSOFT CORPORATION, *et al.*, )  
 )  
Defendants. )  
\_\_\_\_\_ )

Civ. No. 00-00654 (RCL)

MEMORANDUM AND ORDER

This matter comes before the court on the motion [19] of defendant Microsoft Corporation to Dismiss or, in the Alternative, to Transfer Venue.

This is a declaratory judgment action brought by one of Microsoft's insurers, plaintiff Zurich American Insurance Company. Fidelity and Guaranty Insurance Company is also named as a defendant, and it has filed a counterclaim against Microsoft, as well as bringing in eleven additional insurers as third-party defendants. All of the insurers who have responded to the third-party complaint have now either joined a motion by plaintiff Zurich, or filed their own motion, for a preliminary injunction seeking to have this court enjoin defendant Microsoft from proceeding with an action it filed against the insurers in the United States District Court for the Western District of Washington.

Microsoft has requested that its insurers provide defense coverage for the numerous private lawsuits filed around the country, and to cover any liabilities that may be incurred in those private antitrust cases. Whether and to what extent the insurers' policies obligate them to provide the coverage will require application of contract law and the interpretation of various insurance

contracts that Microsoft has had with its insurers over the years. Plaintiff Zurich, prior to notifying Microsoft whether it would deny coverage, filed this suit for a declaratory judgment. Four days later, Microsoft filed its own suit in the Western District of Washington, claiming that the insurance policies were largely negotiated and issued in that district, through insurers' offices located there, and the vast majority of the documents related to the negotiation and issuance of these policies are located in that district. Microsoft claims that most of the relevant witnesses are also in that district. Microsoft correctly points out that the District of Columbia has no relationship whatsoever to these insurance policies, or even to the plaintiff insurer, Zurich. The government antitrust case pending here against Microsoft has nothing to do with this insurance coverage dispute, and Microsoft has not even sought insurance coverage for the government antitrust case.

The insurers point out that the private antitrust cases have now been consolidated in the District of Maryland, less than 50 miles from the District of Columbia, but that is really irrelevant since this case involves the interpretation of insurance contracts, not antitrust law.

This court has previously held that it will not "mechanically" apply the first-to-file rule, but will carefully consider "equitable considerations genuinely relevant to the ends of justice." *Lewis v. NFL*, 813 F. Supp. 1, 4 (D.D.C. 1992). Where plaintiff has no connection whatsoever to the District of Columbia, and the dispute itself has no real connection to the District of Columbia, then the traditional preference given to plaintiff's choice of forum is greatly diminished, at least. Here, the plaintiff Zurich has filed a preemptive declaratory judgment action in an effort to do exactly what the Court of Appeals for this Circuit has held is not permissible in *Hanes v. Millard*, 531 F.2d 585, 592-93 (D.C. Cir. 1976):

The anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum and timing, and it provides a disorderly race to the courthouse.

Zurich filed this preemptive first strike here, before it even advised Microsoft of its decision to deny coverage, in a transparent effort to deprive Microsoft of its choice of forum. The cases cited by Microsoft (at pages 11-14 of their supporting memorandum) clearly support dismissal of this action. The disparaging comments about the United States District Court in the Western District of Washington made by Zurich and other insurers clearly demonstrate why this kind of litigation tactic should not be condoned. This court has absolutely no reason to expect that the insurers, as well as Microsoft, will not be fairly treated by that federal court. The Ninth Circuit Court of Appeals remains available to correct any legal errors, but there is no reason to suspect that “home state” sentiments influence a federal court.

Moreover, the interest of justice does not require transfer of this case since all of the parties here are already before the court in Washington.

Accordingly, Microsoft’s Motion to Dismiss this action is GRANTED, and this action now stands DISMISSED in its entirety.

All pending motions for preliminary injunction are therefore DENIED as moot.

SO ORDERED.

DATE:

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Royce C. Lamberth  
United States District Judge